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5 RUBEN MITCHELL,
6 Petitioner,
7 v.
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9 MICHAEL MARTEL, Warden,
10 Respondent.
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12 Case No. 20-04294 BLF (PR)
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14 **ORDER DENYING PETITION FOR
15 WRIT OF HABEAS CORPUS;
16 DENYING CERTIFICATE OF
17 APPEALABILITY; DIRECTIONS
18 TO CLERK**

19 Petitioner has filed a *pro se* amended petition for a writ of habeas corpus under 28
20 U.S.C. § 2254 challenging his 2016 criminal conviction. Dkt. No. 6 (“Amended
21 Petition”). Respondent filed an answer on the merits. Dkt. No. 12 (“Answer”). Petitioner
22 did not file a traverse, although given an opportunity to do so. For the reasons set forth
23 below, the petition is **DENIED**.

24 **I. BACKGROUND**

25 A jury convicted Petitioner of kidnapping (count 1); assault with a firearm (count
26 2); torture (count 3); rape by a foreign object acting in concert (count 4); assault with a
27 deadly weapon, a hunting knife (count 5); attempted pandering by procuring (count 6); and
28 human trafficking for commercial sex (count 7).¹ *See* Dkt. No. 21 at 46-50; Dkt. No. 21-2
29 at 2-5; *see also* Cal. Pen. Code, §§ 206, 207, 236.1(b), 245(a)(1)-(2), 264.1, 266i(a)(1),
299(a).

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1 Petitioner was sentenced to 45 years to life in state prison, comprised of 25 years to
2 life on count 4 (penetration with a foreign object acting in concert), 20 years on count 7
3 (human trafficking), and a life term on count 3 (torture). Dkt. No. 21-1 at 11.

4 On May 14, 2019, the California Court of Appeal (“state appellate court”) affirmed
5 the judgment. *See* Dkt. No. 30-2 at 242-65; *see also People v. Mitchell*, No. A150156,
6 A150433, 2019 WL 2098789 (Cal. Ct. App. May 14, 2019) (unpublished). On August 21,
7 2019, the California Supreme Court summarily denied a petition for review. Dkt. No. 30-2
8 at 339.

9 When the last state court to adjudicate a federal constitutional claim on the merits
10 does not provide an explanation for the denial,” the federal court should ‘look through’ the
11 unexplained decision to the last related state-court decision that does provide a relevant
12 rationale.” *Wilson v. Sellers*, — U.S. —, 138 S.Ct. 1188, 1192 (2018). “It should then
13 presume that the unexplained decision adopted the same reasoning.” *Id.* Here, the
14 California Supreme Court did not provide an explanation for its denial of the petition for
15 review. *See* Dkt. No. 30-2 at 339. Petitioner did not argue that the California Supreme
16 Court relied on different grounds than the state appellate court. *See generally*, Am. Pet.
17 Accordingly, this Court will “look through” the California Supreme Court’s decision to the
18 state appellate court’s decision. *See Skidmore v. Lizarraga*, No. 14-CV-04222-BLF, 2019
19 WL 1245150, at *7 (N.D. Cal. Mar. 18, 2019) (applying *Wilson*).

20 Petitioner filed the instant federal habeas petition on June 29, 2020 and is
21 proceeding on an amended petition filed on September 9, 2020. *See* Dkt. Nos. 1, 6.
22 Petitioner does not present his arguments in the Amended Petition. Instead, he submits
23 and relies on his briefs filed in the California Court of Appeal and the California Supreme
24 Court. *See generally*, Am. Pet. (Dkt. No. 6 at 33-80; Dkt. No. 6-1 at 1-74).

25 II. STATEMENT OF FACTS

1 The following background facts are from the opinion of the state appellate court on
2 direct appeal:

3 *Trial Overview*

4 A. Prosecution Evidence

5 In May 2013, Booker and Beasley were pimps in Oakland.
6 Beasley and Mitchell were rap artists, and appeared in a music
7 video together. 17-year-old Jane Doe was a prostitute in
8 Oakland. Doe did not have a pimp but knew of pimps in the area,
9 including Booker and Beasley. Booker wanted Doe to
10 "prostitute for him" but she refused.

11 On June 2, 2013, Doe and Beasley "hung out" and had sex. The
12 next day, Beasley planned to drive Doe "out of town," where she
13 would work as a prostitute. Doe, however, changed her mind and
14 asked Beasley to drop her off near her house. Beasley did not
15 drop Doe off. Instead, he took her to several other locations,
16 eventually stopping the car on an isolated road, near a corner
17 where Booker was standing with three or four men, including
18 Mitchell. One man saw Doe and said, "'There goes that bitch.'"
19 The men pointed at Doe. Then they got into a car.

20 Beasley drove away, but shortly thereafter, Booker's car arrived.
21 Booker, Mitchell, and others got out of the car and approached
22 Beasley's car. Booker had a Glock handgun. Booker and the
23 other men dragged Doe out of Beasley's car. Doe screamed for
24 help, but Beasley did not assist her. Doe felt Beasley had set her
25 up because he let the men drag her out of the car.

26 Booker "beat [Doe] up" with his gun, striking her multiple times
27 in the face. Doe's "head was busted" and she lost "so much
28 blood." Booker also put his gun in Doe's mouth and told her to
" '[s]hut up.' " Then he and several other men grabbed Doe by
her hair and threw her in the trunk. The car stopped at Booker's
apartment, and Booker dragged Doe inside.

29 There were "a lot of people" in the apartment, including
30 defendants. [FN 2] People in the apartment were "talking shit"
31 to Doe; Mitchell and others told Doe she "should have just been
32 a ho[]" and Mitchell screamed, "'Why don't you just ho[.]'"
33 Doe was thrown to the ground and hit several times. As she was
34 beaten, the men told her: "You gotta make money for us[.]"
35 Then Doe "blacked out." When she regained consciousness, her
36 neck, arms, and legs were bound with duct tape. A makeshift
37 blindfold had been placed over her head, but it came off. Booker
38 and another man "started cutting" Doe with a machete, first on
39 her breast, then on her back, leg, and stomach.

40 [FN 2] Doe told the police Mitchell was in the
41 apartment. At trial, Doe identified a photograph
42 of Mitchell, but she could not identify him in the

courtroom because he was wearing glasses and he had changed his hairstyle. As Doe and Mitchell were being transported to court during trial, Doe identified Mitchell. She told the sheriff's deputy " 'That's the guy that did this to me. That's the guy that raped me[,] ' " and the deputy confirmed it was Mitchell. At one point during her trial testimony, Doe said she thought Mitchell "was just sitting on the couch," in the apartment, but acknowledged she could not "remember all of the details" about the ordeal.

Booker said, “ ‘Bitch, you gone [sic] make my money’ ” and “ ‘I am going to kill you bitch if you don’t make my money.’ ” Booker put his gun in Doe’s vagina and threatened to kill her if she screamed, saying “ ‘My trigger finger is itching.’ ” Beasley watched. He did not help Doe.

Doe drifted in and out of consciousness. Her head was “busted open” and she was “losing a lot of blood.” Doe’s eyes were swollen shut. She awoke in a bedroom—“naked and cut up”—on top of black garbage bags. She was still duct taped, but “there was so much blood that [her] arms got loose[.]” Doe removed a window screen and jumped out of a window. Still naked, Doe made her way to a nearby driveway and hid underneath a parked car. A man saw Doe, gave her a shirt, and called the police. The man told the police that two men with guns had been looking for Doe, and identified Booker as one of the men.

About five minutes later, the police arrived and found Doe under the car. She was “terrified. She was very, very scared and kept asking [the police officer] to get her out of there.” Doe begged the officer to help her and said a man was “trying to kill [her]” and that he lived nearby. Doe’s face was swollen and bleeding. She had duct tape around her neck. Doe showed the police the car used to kidnap her and the apartment where she was held. She gave the police the name “Paul,” identified Booker’s picture, and said he had been “seeking her to prostitute for him” and that he tried to kill her. Doe also told the police someone was “looking for her” and that “these guys had lots of guns.” [FN 3] Doe was taken to the hospital, where she gave a statement. She was “very shaken, very upset.” A medical examination confirmed Doe’s account of her injuries.

[FN 3] The court admitted a recording from a police officer's body camera. When she gave the police a statement, Doe lied about various details because she was afraid.

The car used to kidnap Doe belonged to Booker. In the apartment, police found a box containing Booker's wallet and personal documents, including his birth certificate. Police also found a roll of duct tape, black trash bags, a long-bladed knife,

1 and Glock handgun ammunition. In a bedroom, there was blood
2 on a window sill. The window screen was on the ground, below
3 the window.
4

5 Latent prints were found on an inside layer of the duct tape used
6 to secure Doe's blindfold. Seven prints "were of sufficient
7 quality and quantity" and had "enough unique detail" to be
8 presented to a fingerprint examiner. Some of the prints were
9 palm prints. Kimberly Lankford, a latent print examiner,
10 identified one of the palm prints as belonging to Mitchell.
11 Another criminalist verified Lankford's identification.
12

13 Shortly before trial, Beasley asked Doe: "Please don't snitch on
14 me. Don't tell on me."
15

16 B. Defense Evidence

17 Ralph Haber, Ph.D., testified as an expert for Mitchell regarding
18 fingerprint identification. He stated the latent print matched to
19 Mitchell lacked "many reliable features" and was "harder to
20 justify . . . as a palm rather than just a piece of a fingerprint." Dr.
21 Haber opined the "print that was lifted wasn't good enough" to
22 make an identification. He did not analyze the print himself; he
23 did not attempt to verify Lankford's work. Dr. Haber
24 acknowledged the Oakland Police Department crime lab is
25 accredited and that he had not reviewed the process the lab used
26 to verify prints.
27

27 The court admitted a 2014 booking photo of Mitchell with no
28 face tattoo. A witness for Beasley corroborated Doe's
description of the abduction and identified Mitchell as one of the
armed kidnappers. The witness claimed she and Beasley went to
a restaurant after Doe was abducted.
29

30 *Verdict and Sentence*

31 In September 2016, the jury convicted Booker and Mitchell of
32 the lesser included offense of kidnapping on count 1 and counts
33 2, 3, 4, 5, 6, and 7. . . .
34

35 In December 2016, the court sentenced defendants. . . . [¶] The
36 court sentenced Mitchell to 45 years to life in state prison,
37 comprised of 25 years to life on count 4 (penetration with a
38 foreign object acting in concert), 20 years on count 7 (human
39 trafficking), and a life term on count 3 (torture). . . .
40

41 After defendants appealed, the trial court amended Booker and
42 Mitchell's respective abstracts of judgment to correct minor
43 sentencing errors. . . .
44

45 *Mitchell*, 2019 WL 2098789, at *1–3.
46

III. DISCUSSION

A. Legal Standard

This Court may entertain a petition for a writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a); *Rose v. Hedges*, 423 U.S. 19, 21 (1975). The writ may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court’s adjudication of the claim: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

“Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). The only definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is in the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. *Id.* at 412; *Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004). While circuit law may be “persuasive authority” for purposes of determining whether a state court decision is an unreasonable application of Supreme Court precedent, only the Supreme Court’s holdings are binding on the state courts and only those holdings need be “reasonably” applied. *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir.), *overruled on other grounds by Lockyer v. Andrade*, 538 U.S. 63 (2003).

“Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme

1 Court's] decisions but unreasonably applies that principle to the facts of the prisoner's
2 case." *Williams*, 529 U.S. at 413. "Under § 2254(d)(1)'s 'unreasonable application'
3 clause, . . . a federal habeas court may not issue the writ simply because that court
4 concludes in its independent judgment that the relevant state-court decision applied clearly
5 established federal law erroneously or incorrectly." *Id.* at 411. A federal habeas court
6 making the "unreasonable application" inquiry should ask whether the state court's
7 application of clearly established federal law was "objectively unreasonable." *Id.* at 409.

8 **B. Claims and Analyses**

9 Petitioner raises the following claims in this federal habeas petition:

10 (1) the trial court erred by restricting defense counsel's presentation of the defense
11 theory during closing argument;

12 (2) the trial court abused its discretion by restricting Petitioner's expert testimony
13 on palm print examinations;

14 (3) the trial court erred by instructing the jury erroneously on the mens rea element
15 of human trafficking;

16 (4) the trial court erred by failing to instruct the jury on false imprisonment (Cal.
17 Pen. Code, § 236) as a lesser included offense to human trafficking (Cal. Pen. Code, §
18 236.1(b));

19 (5) the trial court erred by failing to stay Petitioner's sentence for human trafficking
20 because that offense was a part of an indivisible course of conduct with the forcible
21 penetration and torture counts (counts 3 and 4); and

22 (6) cumulative error.²

23 ² The Amended Petition also identifies the following two claims: (1) resentencing was
24 required on counts 2 and 5 because the trial court orally stated it was imposing the midterm
25 but announced the aggravated term; and (2) Petitioner is entitled to 93 days of presentence
26 conduct credit. *See* Am. Pet. (Dkt. No. 6 at 7-8). However, the record reflects that
27 Petitioner's state appellate counsel submitted a letter in the state appellate court
withdrawing these claims. *See* Dkt. No. 30-2 at 108. A claim is not exhausted where a state
Case No. 20-04294 BLF (PR)

1 **1. Restriction on Defense Theory During Closing Argument**

2 **a. Relevant Facts**

3 During closing argument, the trial court sustained an objection to defense counsel's
4 argument relating to the origin and timing of a photograph of Petitioner. The defense
5 theory was that Petitioner was not the man in the apartment that was identified by Jane
6 Doe because, unlike that man, Petitioner did not have a face tattoo at that time. Petitioner
7 claims that the court significantly restricted presentation of this defense theory and thereby
8 rendered his counsel ineffective. *See Am. Pet., Ex. A at 65-70.*

9 The facts underlying this claim, as summarized by the state appellate court, are as
10 follows:

11 After the incident, Doe told the police Mitchell was at the
12 apartment. At trial, she testified one person in the apartment had
13 a face tattoo. She testified the man said she "should have just
14 been a ho[]." Doe did not identify Mitchell at trial because he
15 was wearing glasses and had a different hair style. She did,
16 however, identify Mitchell's picture. Doe also recognized
17 Mitchell as they were being transported to court; she told a
18 sheriff's deputy "[t]hat's the guy that did this to me. That's the
19 guy that raped me." At the time of trial, Mitchell had a tattoo
20 over his left eyebrow.

21 The court admitted a 2014 booking photograph depicting
22 Mitchell without a face tattoo, authenticated by an affidavit from
23 the sheriff's office. The exhibit also included defense counsel's
24 subpoena for the booking photograph. During closing argument,

25 prisoner presents it in a habeas petition with a court but later withdraws it from
26 consideration. *See Fierro v. Domingo*, 2011 WL 7473763 at *3 (C.D. Cal. Oct. 3, 2011)
27 (holding habeas claims unexhausted where a petitioner withdrew his California Supreme
28 Court petition before it ruled on the merits). It thus appears that Petitioner has not given
the state courts a "full and fair opportunity to resolve federal constitutional claims before
those claims [were] presented to the federal courts." *O'Sullivan v. Boerckel*, 526 U.S. 838,
845 (1999). Because neither the state appellate court nor the California Supreme Court
ruled on these claims, this Court concludes that they are unexhausted. In such
circumstances, the district court must dismiss the petition. *See Rose v. Lundy*, 455 U.S.
509, 522 (1982). But where an unexhausted claim lacks merit, the district court may deny
the mixed petition. *See* 28 U.S.C. § 2254(b)(2). Here, the two unexhausted claims are
moot because the state trial court granted the requested relief. *See* Dkt. No. 30-2 at 91-92.
Thus, these two claims are DENIED.

1 defense counsel displayed a copy of the exhibit and stated: "This
2 is a photo of Mr. Mitchell from March 14th, 2014.... There's his
3 face with no tattoo. That photo is here as a result of a subpoena
4 that I sent to the ... Sheriff's Office. I asked them pursuant to
5 court order to send me a ... booking photograph of [Mitchell]
6 from 2014."

7 The prosecutor objected, and the court sustained the objection.
8 It noted "[t]he document speaks for itself. You can't say that.
9 There's no testimony to that. You just have something on the
10 document." Defense counsel continued, "The ... photograph is
11 dated ... 2014. In that photograph you can see that there is no
12 tattoo. [¶] If there is no tattoo in 2014, then there is no tattoo on
13 his face [on] June 3, 2013." Counsel argued Mitchell was not the
14 man in the apartment with the face tattoo and urged the jury to
15 reject the testimony of Beasley's witness, who identified
16 Mitchell as one of the kidnappers.

17 In rebuttal, the prosecutor urged the jury to look at the exhibit
18 "and make your own determinations. The problem with it is that
19 ... Doe [is] not identifying someone off of a face tattoo. It's not I
20 remember the face tattoo forever. ... She said he looks different
21 because of the hair because I remember dreadlocks and I don't
22 remember glasses. Two things he didn't have when he was seen
23 in custody by ... Doe. [¶] ... [¶] So anything in regards to the face
24 tattoo ... without any questions being asked of her in terms of
25 why there may be a discrepancy is just a red herring and trying
26 to distract you. When you look at the evidence and look at what
27 she said, she knew it was him. She knew it was him and that he
28 changed his looks to make sure that she didn't come in and see
him again."

Mitchell, 2019 WL 2098789, at *8.

b. The State Appellate Court's Rejection of This Claim

19 The state appellate court rejected Petitioner's claim that the trial court's ruling
20 violated Petitioner's due process rights, holding that any alleged error was harmless:

21 Mitchell claims the "court's refusal to allow defense counsel to
22 make a closing argument based on crucial defense evidence,
23 which identified the origin of the booking photograph and
24 established its reliability as a photograph taken after the date of
25 the offense, deeply undermined [his] defense." "A criminal
26 defendant has a well-established constitutional right to have
27 counsel present closing argument to the trier of fact. [Citation.]
28 '[The] right is not unbounded, however; the trial court retains
discretion to impose reasonable time limits and to ensure that
argument does not stray unduly from the mark.' " (*People v.
Benavides* (2005) 35 Cal.4th 69, 110.)

At oral argument, the Attorney General acknowledged that restricting defense counsel from commenting on the origin of the exhibit may have been erroneous, but that any error was harmless. We agree any assumed error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The court admitted the exhibit—which contained the booking photograph, the sheriff's affidavit, and defense counsel's subpoena—into evidence. It allowed defense counsel to make his central point: that Mitchell did not have a face tattoo in 2013 and, as a result, he was not the person with the face tattoo Doe saw in the apartment. (*See People v. Marshall* (1996) 13 Cal.4th 799, 853–854.) The evidence supporting Mitchell's convictions was strong: Doe testified Mitchell was at the apartment when she was tortured. As Doe and Mitchell were being transported to court for trial, Doe told a sheriff's deputy “[t]hat's the guy that raped me” and the deputy confirmed it was Mitchell. Beasley's witness identified Mitchell as one of the armed kidnappers, and Mitchell's palm print was found on an inner layer of duct tape used to bind Doe's blindfold. Precluding defense counsel from describing the methods used to obtain the exhibit was harmless beyond a reasonable doubt.

Mitchell, 2019 WL 2098789, at *9.

c. Analysis

Although complete denial of an opportunity to make a closing argument violates a defendant's constitutional rights, *Herring v. New York*, 422 U.S. 853, 858-65 (1975), the Supreme Court has held that *Herring* “did not clearly establish that the *restriction of summation* also amounts to structural error.” *Glebe v. Frost*, 574 U.S. 21, 24 (2014) (emphasis in original). “In the absence of ‘ ‘the rare type of error’ ’ that requires automatic reversal, relief is appropriate only if the prosecution cannot demonstrate harmlessness.” *Davis v. Ayala*, 576 U.S. 257, 267 (2015). The harmlessness analysis on a petition for writ of habeas corpus mandates that a petitioner is not entitled to relief “unless they can establish that [the alleged error] resulted in ‘actual prejudice.’ ” *Id.; Brecht v. Abrahamson*, 507 U.S. 619 (1993). “Under this test, relief is proper only if the federal court has ‘ ‘grave doubt about whether a trial error of federal law had ‘substantial and injurious effect or influence in determining the jury's verdict.’ ’ [Citation.] There must be more than a ‘ ‘reasonable possibility’ ’ that the error was harmful.” *Davis, supra*, at 267.

1 Assuming, as the state appellate court did, that the trial court's restriction on
2 defense counsel's closing argument was error, Petitioner has not demonstrated actual
3 prejudice. As an initial matter, the record reflects that Petitioner's counsel *did* argue the
4 defense theory: "The [photograph] is dated . . . September 14th, 2014. In that photograph
5 you can see that there is no tattoo. If there is no tattoo in 2014, then there is no tattoo on
6 his face June 3rd, 2013." Dkt. No. 28-1 at 58-59.

7 Moreover, there was strong evidence supporting the jury's finding that Petitioner
8 was involved in the kidnapping and torture of the victim. First, the victim herself testified
9 that Petitioner was one of the assailants in the apartment. Dkt. No. 22 at 83-84, 90.
10 Initially, she had indicated during a photo lineup that Petitioner looked familiar, but she
11 was not certain if he was involved. *Id.* Shortly before trial, however, she encountered him
12 at the courthouse, causing her to run away frightened because she recognized him as one of
13 the men involved in the incident. *Id.* at 133. After seeing him in-person, she testified that
14 she was "sure" he was involved. *Id.* at 83-84. Next, a witness for one of Petitioner's co-
15 defendants testified that she recognized Petitioner when he got out of the car to kidnap the
16 victim. Dkt. No. 27 at 86-87. And lastly, the prosecution's fingerprint expert testified that
17 Petitioner's palm print was found on the duct tape used to bind the victim's blindfold. *See*
18 Dkt. No. 25 at 82-84.

19 Considering this evidence, any error in restricting defense counsel's argument
20 regarding the origin and timing of Petitioner's photograph did not have a "substantial and
21 injurious effect" on the verdict. *See Dillard v. Roe*, 244 F.3d 758, 769–70 (9th Cir.
22 2001), *amended on denial of reh'g* (May 17, 2001) ("Even if we assume, without deciding,
23 that the trial court [committed constitutional error], that ruling could not have had a
24 'substantial and injurious effect or influence in determining the jury's verdict.' . . . There
25 was an abundance of other, uncontradicted evidence that Dillard had suffered the
26 convictions alleged.") (citations omitted).

1 Based on the foregoing, the state appellate court's rejection of Petitioner's first
2 claim was reasonable and is therefore entitled to AEDPA deference. Accordingly, this
3 claim is DENIED.

4 **2. Restrictions on Petitioner's Expert**

5 **a. Relevant Facts**

6 Petitioner next argues that the trial court violated his due process rights by placing
7 certain restrictions on his expert. The facts underlying this claim, as summarized by the
8 state appellate court, are as follows:

9 Mitchell requested Dr. Haber be present when Lankford, the
10 prosecution's fingerprint expert, testified because Dr. Haber
11 would address Lankford's "analysis and conclusions." The
12 prosecutor objected, arguing the jury would "determine the
13 credibility ... [and] quality of the investigation. It's not for
14 someone else to sit in the courtroom and then listen or adjust
15 their testimony to try to impede on that function of the jury."
16 The court denied Mitchell's request.

17 ...

18 Mitchell [also] sought to qualify Dr. Haber as an expert in
19 several areas, including rates of erroneous fingerprint
20 identification. During voir dire, Dr. Haber acknowledged he did
21 not analyze the fingerprints—instead he accepted Lankford's
22 analysis. The court determined Dr. Haber was "not an expert in
23 the area of erroneous rates. . . . He's critiquing other people's
24 opinions about what they've done." Dr. Haber testified the palm
25 print attributed to Mitchell "wasn't good enough" to make a
26 reliable identification.

27 *Mitchell*, 2019 WL 2098789, at *5-6.

28 **b. State Appellate Court's Rejection of This Claim**

29 The state appellate court rejected Petitioner's claim that the trial court's rulings
30 violated Petitioner's due process rights:

31 **A. No Error in Excluding Dr. Haber from the Courtroom While
32 Lankford Testified**

33 ...

34 A trial court has discretion to exclude witnesses, including
35 experts, from the courtroom while other witnesses testify.

(*People v. Roybal* (1998) 19 Cal.4th 481, 511; Evid. Code, § 777.) The purpose of this rule “is to prevent tailored testimony and aid in the detection of less than candid testimony.” (*People v. Valdez* (1986) 177 Cal.App.3d 680, 687.) Here, the court did not abuse its discretion by excluding Dr. Haber from the courtroom while Lankford testified, notwithstanding Mitchell's claim that he articulated a “legitimate purpose” for authorizing Dr. Haber's presence. (*Roybal*, *supra*, at pp. 510–511; *Valdez*, at p. 687.) Mitchell's reliance on cases from other jurisdictions does not alter our conclusion. (See *People v. Waxler* (2014) 224 Cal.App.4th 712, 723.)

B. No Error in Restricting the Scope of Dr. Haber's Expert Testimony

...

Precluding Dr. Haber from offering expert testimony on erroneous fingerprint identification rates was not an abuse of discretion. The court permitted defense counsel to question Dr. Haber about error rates, and allowed him to criticize the reliability of Lankford's identification. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 128 [no abuse of discretion in restricting scope of expert testimony].) Even if the court erred, the error is harmless because it is not reasonably probable Mitchell would have achieved a more favorable result had the court qualified Dr. Haber as an expert in the area of fingerprint identification error rates.

Mitchell, 2019 WL 2098789, at *5-6.

c. Analysis

To the extent that Petitioner's claim merely involves the trial court's purported misapplication of California's evidentiary rules, the claim fails because it involves only an alleged error in state law. “In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States.” *Estelle v. McGuire*, 502 U.S. 62, 68 (1991); *see also* 28 U.S.C. § 2254(a). Habeas relief is not available for an alleged error in the interpretation or application of state law. *Estelle*, 502 U.S. at 68.

As applied here, this law precludes Petitioner's challenge to three of the trial court's rulings concerning Dr. Haber. The trial court first denied Petitioner's request that Dr. Haber be present during the prosecution expert witness's testimony. Dkt. No. 21-3 at 31-

1 32. Pursuant to California Evidence Code § 777³, the court stated that it would not be “fair
2 to anybody” to have Dr. Haber tailor his testimony to that of another witness. The trial
3 court then determined that Dr. Haber was unqualified to testify as an expert on error rates
4 because he had merely “critique[ed] other people’s opinions about what they’ve done.”
5 Dkt. No. 26 at 17. The trial court did, however, permit Dr. Haber to testify on error rates as
6 a non-expert. And lastly, the trial court held that Dr. Haber could not testify about
7 recertification requirements for latent print examiners due to lack of foundation.⁴

8 The Ninth Circuit has made clear that state law issues of admissibility and
9 foundation are not cognizable on federal habeas review. *See Johnson v. Sublett*, 63 F.3d
10 926, 931 (9th Cir. 1995) (denying habeas relief based on claim that admission of wooden
11 clubs found at defendant’s house was unconstitutional due to lack of evidence linking clubs
12 to crimes because claim merely “present[ed] state-law foundation and admissibility”).
13 Thus, even accepting Petitioner’s argument that the trial court erred, those purported errors
14 would not entitle Petitioner to habeas relief. In any event, the state appellate court held
15 that the trial court did not err under state law and that any alleged error was harmless. This
16 Court is bound by the state appellate court’s interpretation of state law. *See Bradshaw v.*
17 *Richey*, 546 U.S. 74, 76 (2005) (per curiam) (stating that “a state court’s interpretation of
18 state law, including one announced on direct appeal of the challenged conviction, binds a
19 federal court sitting in habeas corpus”).

20 Furthermore, the fact that petitioner has invoked his rights under the Fifth and Sixth
21 Amendments does not render his otherwise state evidentiary claim a cognizable federal
22 claim. A federal habeas petitioner may not transform a state-law issue into a federal one

23 ³ This statute provides, in relevant part, that “the court may exclude from the courtroom
24 any witness not at the time under examination so that such witness cannot hear the
testimony of other witnesses.” Cal. Evid. Code, § 777(a).

25 ⁴ The state appellate court did not address this third claim of error, even though Petitioner
26 presented it on appeal. “When a federal claim has been presented to a state court and the
state court has denied relief, it may be presumed that the state court adjudicated the claim
27 on the merits in the absence of any indication or state-law procedural principles to the
contrary.” *Harrington v. Richter*, 562 U.S. 86, 99 (2011).

1 merely by making a general appeal to a constitutional guarantee, such as the right to due
2 process. *See Gray v. Netherland*, 518 U.S. 152, 163 (1996). For this reason, the Ninth
3 Circuit repeatedly has held that a habeas petitioner's mere reference to the Due Process
4 Clause is insufficient to render his claims viable under the Fourteenth Amendment. *See*
5 *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994); *Miller v. Stagner*, 757 F.2d
6 988, 993-94 (9th Cir. 1985).

7 Regardless, even if Petitioner had asserted a cognizable challenge to the trial court's
8 decisions, that challenge would not entitle Petitioner to habeas relief. "Whether rooted
9 directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory
10 Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees
11 criminal defendants 'a meaningful opportunity to present a complete defense.' " *Crane v.*
12 *Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485
13 (1984)) (citations omitted); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). But the
14 right to present relevant evidence is subject to reasonable restrictions, such as state
15 evidentiary rules. *Moses v. Payne*, 555 F.3d 742, 757 (9th Cir. 2009); *see also LaJoie v.*
16 *Thompson*, 217 F.3d 663, 668 (9th Cir. 2000) (observing that right to present evidence in
17 criminal case " 'may, in appropriate circumstances, bow to accommodate other legitimate
18 interests in the criminal trial process' ") (quoting *Michigan v. Lucas*, 500 U.S. 145, 149
19 (1991)). Indeed, "state and federal rulemakers have broad latitude under the Constitution to
20 establish rules excluding evidence from criminal trials. Such rules do not abridge an
21 accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate
22 to the purposes they are designed to serve.' " *Green v. Lambert*, 288 F.3d 1081, 1090 (9th
23 Cir. 2002) (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)) (emphasis in
24 original). The Supreme Court, moreover, has "indicated its approval of 'well-established
25 rules of evidence [that] permit trial judges to exclude evidence if its probative value is
26 outweighed by certain other factors such as unfair prejudice, confusion of the issues, or

1 potential to mislead the jury.’ ” *Moses*, 555 F.3d at 757 (quoting *Holmes v. South*
2 *Carolina*, 547 U.S. 319, 326 (2006)).

3 The Ninth Circuit has observed that “[t]he Supreme Court has found a violation of
4 the right to present a complete defense [only] in cases where a state evidentiary rule, on its
5 face, ‘significantly undermined fundamental elements of the defendant’s defense,’ but did
6 little or nothing to promote a legitimate state interest.” *United States v. Pineda-Doval*, 614
7 F.3d 1019, 1033 n.7 (9th Cir. 2010) (emphasis added). Specifically, the Supreme Court has
8 struck down rules that “preclude[] a defendant from testifying, exclude[] testimony from
9 key percipient witnesses, or exclude[] the introduction of all evidence relating to a crucial
10 defense.” *Moses*, 555 F.3d at 758.

11 None of the trial court’s challenged rulings was made under any rule that falls into
12 any of the categories of evidentiary rules struck down by the Supreme Court. Petitioner’s
13 challenge here is, in essence, a challenge to the way the trial court exercised its discretion.
14 Under AEDPA, such a claim must fail because the Supreme Court has not squarely
15 addressed whether a trial court’s exclusion of witnesses or evidence under a rule requiring
16 it to “balance factors and exercise its discretion” may violate due process, nor has it
17 established a “controlling legal standard” for evaluating such discretionary decisions.
18 *Moses*, 555 F.3d at 758-60; *see Brown v. Horell*, 644 F.3d 969, 983 (9th Cir. 2011) (noting
19 that, since the Ninth Circuit issued its opinion in *Moses*, “the Supreme Court has not
20 decided any case either ‘squarely address[ing]’ the discretionary exclusion of evidence and
21 the right to present a complete defense or ‘establish[ing] a controlling legal standard’ for
22 evaluating such exclusions.”). In the absence of any such Supreme Court precedent, the
23 state appellate court’s decision upholding the trial court’s exercise of its discretion cannot
24 be contrary to, or an unreasonable application of, clearly established federal law as
25 determined by the Supreme Court. *Moses*, 555 F.3d at 760; *see Carey v. Musladin*, 549
26 U.S. 70, 77 (2006) (where Supreme Court precedent gives no clear answer to question
27

1 presented, “it cannot be said that the state court ‘unreasonab[ly] appli[ed] clearly
2 established Federal law’ ”). Accordingly, this claim is also DENIED.

3 **3. Instructional Error**

4 **a. Relevant Facts**

5 Petitioner further claims that the jury was improperly instructed on the intent
6 element in the human trafficking instruction, in violation of his due process rights. The
7 state appellate court summarized the facts underlying this claim as follows:

8 The elements of human trafficking are “(1) the defendant either
9 deprived another person of personal liberty or violated that other
10 person's personal liberty; and (2) when the defendant did so, he
... intended to obtain forced labor or services from that person.”
(*People v. Halim* (2017) 14 Cal.App.5th 632, 643.)

11 Here, the second element of the jury instruction—a modification
12 of CALCRIM No. 1243—stated: “[w]hen the defendant acted,
13 *the other person* intended to maintain a violation of ... [section]
14 266h or 266i.” (Italics added.) Defendants argue the human
trafficking conviction must be reversed because the instruction
did not require the jury to find defendants possessed the requisite
intent.

15 *Mitchell*, 2019 WL 2098789, at *6.

16 **b. State Appellate Court’s Rejection of This Claim**

17 The state appellate court acknowledged the typographical error in the jury
18 instruction but held that it was harmless:

19 We conclude the error was harmless beyond a reasonable doubt
20 because it “did not contribute to the jury's verdict.” (*People v.*
21 *Cole* (2004) 33 Cal.4th 1158, 1208; *Chapman v. California*
22 (1967) 386 U.S. 18, 24.) The evidence established defendants
23 had the present intent to force Doe to work as a prostitute: Doe
24 testified Booker was attempting to force her to work as a
prostitute and statements Booker and Mitchell made in the
25 apartment corroborated Doe's testimony—Mitchell and others
told Doe she needed to “make money for us” and Booker
threatened to kill Doe if she did not “make ... money” for him.
26 Even with the typographical error, a logical reading of the
instruction required the jury to find defendants had the intent to
obtain forced labor or services from Doe. The jury recognized
the instruction as written was illogical; its verdict on the human
trafficking charge—based on overwhelming evidence—

1 establishes the error in the jury instruction was of no
2 consequence.

3 In an effort to establish they lacked the intent to force Doe to
4 work as a prostitute, defendants rely on Doe's testimony that
5 about a week before the incident, Booker wanted Doe to
6 "prostitute for him" but she refused. Defendants claim this
7 testimony shows they "did not attempt to influence Doe's future
8 conduct, but instead sought to exact retribution for Doe's earlier
9 refusal to engage in prostitution." We are not persuaded this
10 evidence would lead a rational juror to conclude defendants
lacked the present intent to influence Doe to be a prostitute. Two
additional factors persuade us the error in the jury instruction
was harmless beyond a reasonable doubt: (1) the court instructed
the jury with CALCRIM No. 252 (union of act and intent:
general and specific intent together), which informed the jury
that human trafficking required a finding of specific intent; and
(2) the jury convicted defendants of attempted pandering, which
required a finding that defendants possessed the intent to effect
or maintain a violation of the pandering statute.

11 We conclude the instructional error was harmless beyond a
12 reasonable doubt. (*People v. Jurado* (2006) 38 Cal.4th 72, 123
13 [omission of intent element in jury instruction was harmless
beyond a reasonable doubt]; *People v. Sakarias* (2000) 22
14 Cal.4th 596, 625 [affirming notwithstanding instructional error
where jury "could not have rationally found the omitted element
unproven"].)

15 *Mitchell*, 2019 WL 2098789, at *6-7.

16 **c. Analysis**

17 To obtain federal collateral relief for errors in the jury charge, a petitioner must
18 show that the ailing instruction by itself so infected the entire trial that the resulting
19 conviction violates due process. *See Estelle*, 502 U.S. at 72; *Cupp v. Naughten*, 414 U.S.
20 141, 147 (1973); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) ("[I]t must
21 be established not merely that the instruction is undesirable, erroneous or even "universally
22 condemned," but that it violated some [constitutional right]."). The instruction may not be
23 judged in artificial isolation but must be considered in the context of the instructions as a
24 whole and the trial record. *See Estelle*, 502 U.S. at 72. In other words, the court must
25 evaluate jury instructions in the context of the overall charge to the jury as a component of
26 the entire trial process. *United States v. Frady*, 456 U.S. 152, 169 (1982) (citing

1 *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)); *see, e.g., Middleton v. McNeil*, 541 U.S.
2 433, 434-35 (2004) (per curiam) (no reasonable likelihood that jury misled by single
3 contrary instruction on imperfect self-defense defining “imminent peril” where three other
4 instructions correctly stated the law); *cf. Chambers v. McDaniel*, 549 F.3d 1191, 1199-00
5 (9th Cir. 2008) (finding constitutional error where, in addition to erroneous instruction on
6 premeditation, murder instructions as a whole and state’s emphasis on erroneous
7 instruction in closing argument allowed jury to convict petitioner of first-degree murder
8 without finding separately all elements of the crime); *see also United States v. Rodriguez*,
9 971 F.3d 1005, 1012-13 (9th Cir. 2020) (in a federal criminal appeal, holding that even if
10 the district court had erred in some discussion of the jury instructions, it “used
11 [defendant’s] preferred formulation where it mattered, i.e., in laying out the elements of
12 the offense,” and so there was “no reversible error when the jury instructions are
13 considered ‘as a whole’”) (citation omitted); *Ross v. Davis*, 29 F.4th 1028, 1045 (9th Cir.
14 2022) (in capital case, state court’s determination that erroneous aider or abettor
15 instruction was harmless was not unreasonable because, as state court found, the specific
16 intent culpability requirement was encompassed under alternative instruction).

17 Petitioner is not entitled to relief on this claim because he has not shown that the
18 CALCRIM No. 1243 instructional error so infected the entire trial that the resulting
19 conviction violates due process. As the state appellate court noted, there was ample
20 evidence that Petitioner possessed a present intent to induce the victim to prostitute. The
21 victim testified that both of Petitioner’s co-defendants tried to force her to prostitute for
22 them; the men in the apartment kept telling the victim, “You gotta make money for us”;
23 and Petitioner himself told her, “why don’t you just ho[].” Dkt. No. 22 at 116, 140.
24 Moreover, the erroneous instruction was given along with CALCRIM No. 1151
25 (pandering), which required a showing that, among other things, “The defendant intended
26 to influence Jane Doe to be a prostitute.” Dkt. No. 16 at 33. As Petitioner was convicted of

1 attempted pandering, this necessarily required a finding by the jury that Petitioner had the
2 present intent to influence the victim to be a prostitute. Even further, the prosecutor
3 explained during closing argument that human trafficking has two elements: “[D]id he
4 deprive personal liberty of another with specific intent to effect or maintain a violation of
5 pimping or pandering.” Dkt. No. 36 at 62. As to the second element, the prosecutor noted
6 that this gets to “the mindset of the defendant when they deprived someone of that liberty.
7 [¶] In other words, to put it simply for this case, human trafficking in this case is a question
8 of did the defendants kidnap Jane Doe with the intent to pimp or pander?” *Id.* at 63.

9 This evidence, considered in toto, supports the jury’s finding that Mitchell had the
10 requisite intent for the human trafficking conviction. Accordingly, the state appellate
11 court’s rejection of Petitioner’s first claim was reasonable and is therefore entitled to
12 AEDPA deference. This claim is DENIED.

13 4. False Imprisonment as a Lesser Included Offense

14 a. Relevant Facts

15 In his fourth claim, Petitioner asserts the trial court committed reversible error when
16 it failed to instruct on false imprisonment as a lesser included offense of human trafficking.
17 The facts underlying this claim, as summarized by the state appellate court, are as follows:

18 Booker and Mitchell claim the court erred by failing to instruct
19 the jury on false imprisonment as a lesser included offense of
20 human trafficking. Misdemeanor false imprisonment has one
21 element: the defendant committed an “unlawful violation of the
22 personal liberty of another.” (§ 236.) A defendant who commits
human trafficking necessarily commits misdemeanor false
imprisonment because he deprives or violates the personal
liberty of another, with the intent to effect or maintain a violation
of the pandering statute. (§ 236.1.)

23 *Mitchell*, 2019 WL 2098789, at *7.

24 b. State Appellate Court’s Rejection of This Claim

1 The state appellate court assumed that the failure to instruct on false imprisonment
2 was error, but it held that Petitioner was not entitled to relief on this claim because the
3 error was harmless:

4 [¶] We assume misdemeanor false imprisonment is a lesser
5 included offense of human trafficking, and that the court erred
6 by failing to instruct on that lesser included offense.

7 We conclude the jury's verdict on attempted pandering
8 demonstrates the failure to instruct on false imprisonment was
9 harmless. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) In
10 convicting defendants of attempted pandering, the jury made the
11 necessary finding to elevate misdemeanor false imprisonment to
12 human trafficking—i.e., that defendants acted with the intent to
13 violate the pandering statute. As a result, it is not reasonably
14 probable Booker and Mitchell would have obtained a more
15 favorable result had the jury been instructed with the lesser
16 included offense.

17 Booker and Mitchell claim they did not have the present intent
18 to pander. This argument fails for the reasons discussed ante,
19 and ignores the numerous statements Booker, Mitchell, and
20 others made on the day of the incident establishing they held
21 Doe against her will as a means to coerce her to prostitute
22 herself. Booker acknowledges these statements are “some
23 evidence of an intent to influence Doe that was
24 contemporaneous with the ... kidnapping” and that Doe's
25 testimony supported a conclusion that “her captors were
26 animated by a desire to influence her to engage in
27 prostitution[.]”

28 Any assumed error in failing to instruct the jury on the lesser
1 included offense of false imprisonment is harmless. (*People v.*
2 *Beames* (2007) 40 Cal.4th 907, 928.)

3 *Mitchell*, 2019 WL 2098789, at *7.

4 c. Analysis

5 The failure to instruct on a lesser-included offense in a capital case is constitutional
6 error if there was evidence to support the instruction. *See Beck v. Alabama*, 447 U.S. 625,
7 638 (1980); *Turner v. Marshall*, 63 F.3d 807, 818 (9th Cir. 1995), *overruled on other*
8 *grounds by Tolbert v. Page*, 182 F.3d 677, 685 (9th Cir. 1999) (en banc). But the failure of
9 a state trial court to instruct on lesser-included offenses in a non-capital case does not
10 present a federal constitutional claim. *See Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir.
11

1 2000); *Windham v. Merkle*, 163 F.3d 1092, 1105-06 (9th Cir. 1998); *cf. Vickers v. Ricketts*,
2 798 F.2d 369, 371 (9th Cir. 1986) (where evidence supports lesser-included-offense
3 instruction in capital case, due process requires that court give instruction *sua sponte*), *cert. denied*, 479 U.S. 1054 (1987).

5 In the absence of a clearly established federal constitutional right to a jury
6 instruction on a lesser-included offense in a non-capital case, Petitioner's claim for relief
7 fails. In addition, as discussed *supra*, there was ample evidence to support Petitioner's
8 conviction for human trafficking. Petitioner is thus not entitled to relief on this claim.

9 **5. Cumulative Error**

10 Petitioner argues that the cumulative effect of the alleged constitutional errors
11 discussed above violated his right to a fair trial. Dkt. No. 6-1 at 29-30. The state appellate
12 court disagreed: "We also reject Mitchell's cumulative error argument. (*People v. Duff*
13 (2014) 58 Cal.4th 527, 562.)" *Mitchell*, 2019 WL 2098789, at *3 fn. 4.

14 "Under traditional due process principles, cumulative error warrants habeas relief
15 only where the errors have so infected the trial with unfairness as to make the resulting
16 conviction a denial of due process." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2017)
17 (internal quotation marks omitted); *see McDowell v. Calderon*, 107 F.3d 1351, 1368 (9th
18 Cir.) (cumulative effect of errors may deprive habeas petitioner of due process right to fair
19 trial), *amended*, 116 F.3d 364 (9th Cir. 1997), *vacated in part by* 130 F.3d 833, 835 (9th
20 Cir. 1997) (en banc). *See, e.g., Alcala v. Woodford*, 334 F.3d 862, 893-95 (9th Cir. 2003)
21 (reversing conviction where multiple constitutional errors hindered defendant's efforts to
22 challenge every important element of proof offered by prosecution); *Thomas v. Hubbard*,
23 273 F.3d 1164, 1179-81 (9th Cir. 2002), *overruled on other grounds by Payton v.*
24 *Woodford*, 299 F.3d 815, 829 n.11 (9th Cir. 2002) (reversing conviction based on
25 cumulative prejudicial effect of (a) admission of triple hearsay statement providing only
26 evidence that defendant had motive and access to murder weapon; (b) prosecutorial

1 misconduct in disclosing to the jury that defendant had committed prior crime with use of
2 firearm; and (c) truncation of defense cross-examination of police officer, which prevented
3 defense from adducing evidence that someone else may have committed the crime and
4 evidence casting doubt on credibility of main prosecution witness); *United States v.*
5 *Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (prejudice resulting from cumulative effect
6 of improper vouching by prosecutor, improper comment by prosecutor about defense
7 counsel, and improper admission of evidence previously ruled inadmissible required
8 reversal even though each error evaluated alone might not have warranted reversal).

9 In *Parle*, the Ninth Circuit affirmed a finding of cumulative error where the trial
10 court committed multiple evidentiary errors that “went to the heart of the defense's case
11 and the only issue before the jury.” *Parle*, 505 F.3d at 924, 934. The court explained that
12 “[a] unique and critical thread [ran] through the trial errors”: all of the improperly excluded
13 evidence in petitioner's case supported his defense that he lacked the requisite state of
14 mind for first degree murder while all of the erroneously admitted evidence undermined
15 his defense and credibility and bolstered the State's case. *Id.* at 930. The court found there
16 was a “unique symmetry” of the evidentiary errors, which “starkly amplified” each other
17 and which bore a “direct relation to the sole issue contested at trial,” i.e., petitioner's state
18 of mind at the time of the crime, rendering petitioner's defense “ ‘far less persuasive,’ ”
19 infecting his trial with unfairness and depriving him of due process.” *Id.* at 932-34
20 (citations omitted).

21 A cumulative error claim is “rarely successful,” *Smith v. Wasden*, 747 F. App'x 471,
22 478 (9th Cir. 2018), and where there is no “symmetry of error,” habeas relief will not be
23 granted. *See Ybarra v. McDaniel*, 656 F.3d 984, 1001 (9th Cir. 2011). In *Ybarra*, for
24 instance, the Ninth Circuit concluded that the claimed errors regarding the composition of
25 the jury “did not amplify each other” and the claimed errors at sentencing did not have a
26 “synergistic effect.” Where “[t]he effect of the improper jury instruction was to focus the

1 jurors on the horrific nature of the murder; [and] the effect of the improper prosecutorial
2 statements was to focus the jurors on their role as community members,” the combined
3 effect of the errors did not “infect [] the trial with unfairness” or render petitioner’s
4 defense “far less persuasive than it might otherwise have been” such that it violated
5 petitioner’s due process rights. *Id.* (alteration in original) (citation omitted).

6 Cumulative error is more likely to be found prejudicial when the government’s case
7 is weak. *See id.*; *see, e.g.*, *United States v. Preston*, 873 F.3d 829, 846 (9th Cir. 2017)
8 (noting the government’s “hinged almost entirely on [the victim’s] testimony with “little
9 additional proof to corroborate his allegations”); *Thomas*, 273 F.3d. at 1180 (noting that
10 the only substantial evidence implicating the defendant was the uncorroborated testimony
11 of a person who had both a motive and an opportunity to commit the crime); *Walker v.*
12 *Engle*, 703 F.2d 959, 961-62, 968 (6th Cir.), *cert. denied*, 464 U.S. 951 (1983). However,
13 where there is no single constitutional error existing, nothing can accumulate to the level
14 of a constitutional violation. *See Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011);
15 *Demetrulias v. Davis*, 14 F.4th 898, 916 (2021); *Mancuso v. Olivarez*, 292 F.3d 939, 957
16 (9th Cir. 2002); *Fuller v. Roe*, 182 F.3d 699, 704 (9th Cir. 1999); *Rupe v. Wood*, 93 F.3d
17 1434, 1445 (9th Cir. 1996). Similarly, there can be no cumulative error when there has not
18 been more than one error. *United States v. Solorio*, 669 F.3d 943, 956 (9th Cir. 2012).

19 Here, Petitioner’s cumulative error claim fails for several reasons. First, the
20 government’s case was substantial and multifaceted, relying on the victim’s testimony, the
21 testimony of a co-defendant’s witness, and palm print analysis. Second, the assumed
22 errors did not create a “symmetry of error” bearing directly on the “heart of the defense’s
23 case.” Of the assumed errors addressed above, only the trial court’s limit on defense
24 counsel’s argument relating to the origin and timing of a photograph of Petitioner went to
25 the heart of the defense theory. But even then, Petitioner’s counsel was not prevented
26 from arguing that theory and in fact *did* argue it. The other two instructional errors did not

1 result in the admission or exclusion of evidence going directly to the heart of Petitioner's
2 case and involved alleged errors that the state appellate court reasonably found were
3 harmless considering other jury instructions given. Considering the alleged underlying
4 claims of error, this is not one of those rare cases involving a "unique symmetry" of errors,
5 all amplifying the prejudice caused by the other and all bearing directly on the sole
6 contested issue at trial.

7 The Court finds that the trial court errors, even when considered cumulatively, did
8 not render Petitioner's defense "far less persuasive than it might [otherwise] have been"
9 nor did the combined effect of the errors have a "substantial and injurious effect or
10 influence on the jury's verdict." *See Parle*, 505 F.3d at 927-28 (alteration in original)
11 (citation omitted). The state court's rejection of Petitioner's cumulative error claim was
12 neither contrary to, nor involved an unreasonable application of, clearly established federal
13 law, as determined by the United States Supreme Court. Petitioner is thus not entitled to
14 habeas relief.

15 **6. Stay Imposition of Sentence**

16 **a. Relevant Facts**

17 In his final claim, Petitioner contends the trial court erred when it failed to stay his
18 sentence on the human trafficking count because it was part of an indivisible course of
19 conduct with the forcible penetration and torture counts. Dkt. No. 6-1 at 31-33). The state
20 appellate court reported the relevant facts as follows:

21 The court sentenced Mitchell to 45 years to life in prison,
22 comprised of consecutive sentences on count 4 (penetration with
23 a foreign object acting in concert), count 7 (human trafficking),
24 and count 3 (torture). Mitchell argues the court erred by failing
to stay imposition of sentence on count 7 because that crime
shared the same "intent and objective" as the torture and forcible
penetration.

25 *Mitchell*, 2019 WL 2098789, at *10.

26 **b. State Appellate Court's Rejection of Claim**

1 The state appellate court disagreed, holding that the counts did not share the same
2 intent and objective and therefore were not part of an indivisible course of conduct:

3 Section 654 prohibits multiple punishment for different offenses
4 committed with a single intent or objective. “[I]f all of the
5 offenses were merely incidental to, or were the means of
6 accomplishing or facilitating one objective, defendant may be
7 found to have harbored a single intent and therefore may be
8 punished only once. [Citation.] ¶ If, on the other hand,
9 defendant harbored ‘multiple criminal objectives,’ which were
10 independent of and not merely incidental to each other, he may
11 be punished for each statutory violation committed in pursuit of
12 each objective, ‘even though the violations shared common acts
13 or were parts of an otherwise indivisible course of conduct.’ ”
(*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

14 “Whether a particular offense is part of a course of conduct for
15 purposes of section 654 is a question of fact. [Citation.] In the
16 absence of an explicit ruling by the trial court ... [appellate
17 courts] infer that the court made the finding appropriate to the
18 sentence it imposed, i.e., either applying section 654 or not
19 applying it.” (*People v. Mejia* (2017) 9 Cal.App.5th 1036, 1045;
20 *People v. Alford* (2010) 180 Cal.App.4th 1463, 1468.) “A trial
21 court’s implied finding that a defendant harbored a separate
22 intent and objective for each offense will be upheld on appeal if
23 ... supported by substantial evidence.” (*People v. Blake* (1998)
24 68 Cal.App.4th 509, 512.)

25 We conclude substantial evidence supports the implied
26 conclusion that defendants harbored separate intents and
27 objectives for counts 3 (torture) and 7 (human trafficking). The
28 prosecution theory was the torture occurred when Booker and
another man cut Doe with a machete. Torture requires “the
intentional commission of one or more assaultive acts ...
committed with the intent to cause cruel or extreme pain and
suffering.” (*People v. Mejia, supra*, 9 Cal.App.5th at p. 1044.)
Here, the evidence supports a conclusion that Booker and the
other man tortured Doe for sadistic enjoyment. Mitchell’s
statement that Doe “should have just been a ho[]” also supports
an inference he aided and abetted Booker’s intent to take
retribution on Doe for refusing to work for Booker previously.
The objective in committing the human trafficking was distinct:
to force Doe to prostitute herself. (*People v. Halim, supra*, 14
Cal.App.5th at p. 643.)

29 Because the trial court could reasonably discern multiple and
30 independent criminal objectives for counts 3 and 7, section 654
31 did not preclude imposition of consecutive sentences. (See
32 *People v. Beman* (2019) 32 Cal.App.5th 442, 444 [section 654
33 did not bar punishment for conspiracy to commit human
34 trafficking and substantive offense of human trafficking in part

1 because “defendant’s conspiracy to commit human trafficking
2 had broader objectives” than the substantive offense]; *People v.*
3 *Mejia, supra*, 9 Cal.App.5th at pp. 1046, 1047 [criminal threats
4 were not necessary to, nor “committed in furtherance of the
5 crime of torture”].)

6 Mitchell claims human trafficking (count 7) and penetration by
7 a foreign object acting in concert (count 4) shared the same
8 intent and objective: “to aid and abet Booker in engaging Doe in
9 prostitution.” We disagree. Booker put his gun in Doe’s vagina
10 and threatened to kill her if she screamed, suggesting his objective
11 in committing this offense was to dissuade Doe from calling for
12 help or reporting the incident, or to achieve sexual gratification.
13 The trial court could reasonably discern different criminal
14 objectives for the human trafficking and the foreign penetration,
15 a gratuitous act of violence separate from the human trafficking.
16 (*People v. Pearson* (2012) 53 Cal.4th 306, 333 [no violation of
17 section 654 because “two separate, individually punishable
18 criminal acts were committed”]; *People v. Assad* (2010) 189
19 Cal.App.4th 187, 201 [no error in imposing separate punishment
20 on inflicting corporal injury and torture]; *People v. Perez* (1979)
21 23 Cal.3d 545, 552 [cautioning against defining a criminal
22 objective so broadly as to encompass a string of separate
23 crimes]; *People v. Saffle* (1992) 4 Cal.App.4th 434, 448
24 [sentencing for sodomy, digital penetration, and false
25 imprisonment arising out of attack on same victim did not
26 violate section 654].)

27 *Mitchell*, 2019 WL 2098789 at *10-11.

28 c. Analysis

1 As explained above, a writ of habeas corpus can only be granted for a violation of
2 federal law. Whether the trial court violated California Penal Code § 654 in sentencing
3 Petitioner is a matter of state law which this court cannot reach. Accordingly, Petitioner is
4 not entitled to habeas corpus relief as to this claim.

29 IV. CONCLUSION

30 After a careful review of the record and pertinent law, the Court concludes that the
31 Petition must be **DENIED**.

32 Further, a Certificate of Appealability is **DENIED**. See Rule 11(a) of the Rules
33 Governing Section 2254 Cases. Petitioner has not made “a substantial showing of the
34 denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Nor has Petitioner demonstrated
35 that “reasonable jurists would find the district court’s assessment of the constitutional
36

1 claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may
2 not appeal the denial of a Certificate of Appealability in this Court but may seek a
3 certificate from the Court of Appeals under Rule 22 of the Federal Rules of Appellate
4 Procedure. *See* Rule 11(a) of the Rules Governing Section 2254 Cases.

5 The Clerk shall terminate any pending motions, enter judgment in favor of
6 Respondent, and close the file.

7 **IT IS SO ORDERED.**

8 Dated: July 11, 2022


9 BETH LABSON FREEMAN
United States District Judge

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United States District Court
Northern District of California

Case No. 20-04294 BLF (PR)
ORDER DEN. PET. FOR WRIT OF HABEAS CORPUS; DEN. CERTIFICATE OF APPEALABILITY